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Supreme Court of the United States

OCTOBER TERM, 1957

No. 395

UNITED STATES OF AMERICA, PETITIONER

vs.

MOLLY G. BESS

&

No. 410

MOLLY G. BESS, PETITIONER

vs.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 395, Petition for certiorari filed August 22, 1957
No. 410, Petition for certiorari filed August 29, 1957
Certiorari granted October 28, 1957

SUPREME COURT OF THE UNITED STATES

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Docket No. 12,026

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,

v.

MOLLY G. BESS, *Defendant-Appellant*

Appendix for Appellant's Brief—Filed September 7, 1956

1 IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY —

Docket Entries

DOCKET ENTRIES

1952

Dec. 22—Complaint filed.
Dec. 22—Summons issued.
Dec. 22—Notice of allocation of case to Trenton filed.

1953

Jan. 7—Summons returned served on 12/31/52 filed.

Jan. 12—Answer filed.

Sept. 7—Pre-trial conference.
To be tried week of Nov. 17, 1953 (Forman)

Oct. 20—Admissions of fact under Rule 36 (service acknowledged) filed.

Oct. 20—Answers to interrogatories (service acknowledged) filed.

1955

Jan. 13—Trial moved before Chief Judge Forman *without Jury.*
Facts stipulated.
Case submitted on question of law involved.
Memorandum to be submitted.
Decision reserved.

Jan. 24—Transcript re Argument by Mr. Oppenheim filed.

Aug. 2—Notice of Assignment of Case to Judge Forman filed.

Sept. 7—Opinion filed (Forman).

Oct. 26—Notice of settlement of judgment filed.

Oct. 27—Affidavit of mailing notice of settlement filed.

Nov. 7—Ordered hearing on proposed judgment.
Adjourned to 11/21/55 (Forman).

Nov. 21—Hearing on proposed judgment before Chief Judge Forman.
Judgment to be submitted.

 1956

May 22—Order for Judgment in favor of the Plaintiff, United States of America and *vs.* the Defendant, Molly G. Bess, in the sum of $11,657.30 with costs, filed 5/21/56 (Forman).
Notice mailed.

May 22—Statement of Plaintiff's costs taxed at $46.20 filed.

May 22—Stipulation of facts filed 1/13/55 (Exhibit No. P-1).

July 16—Notice of Appeal, filed.

July 16—$250.00 in cash deposited in Registry in lieu of bond.

July 16—Copies of Notice of Appeal mailed to United States Attorney and to Clerk U. S. Court of Appeals.

IN UNITED STATES DISTRICT COURT

Stipulation—January 13, 1955

It is hereby stipulated by and between the respective undersigned attorneys representing each party to this action that the following facts shall be deemed to be true, subject however to the right of either party to offer in evidence any additional facts not in conflict therewith, and with the further understanding that counsel for each party reserves the right to object to the admissibility in evidence of the facts herein stipulated on the ground of immateriality or irrelevance.

1. This action has been authorized by the Commissioner of Internal Revenue of the United States Treasury Department and is brought under the direction of the Attorney General of the United States.

2. Defendant, Molly G. Bess, resides in Deal, Monmouth County, New Jersey.

3. Herman Bess, the husband of defendant, died June 29, 1950, a resident of New Jersey.

4. During the years involved, namely, 1945, 1946 and 1947, the decedent was a sales director of various commercial radio stations.

5. On March 15, 1946, Bess filed his income tax return for 1945, reporting thereon tax due in the sum of $11,101.88, and claiming a refund of tax in the sum of $10,218.16, which later sum was refunded to him by the Commissioner of Internal Revenue, with interest of $165.03 on August 21, 1946. Thereafter, on June 17, 1948, Bess signed a Form 870 consenting to the assessment of additional income tax for the year 1945, in the sum of $10,119.31, plus interest, following an audit of his return by a revenue agent. On July 30, 1948, the Commissioner assessed for the year 1945, the total sum of $11,514, composed of $10,119.31 additional income tax, plus $1,421.69 interest thereon. Notice and demand was made on July 30, 1948, and a second notice and demand on August 9, 1948. By virtue of periodic payments made by Bess until his death, the outstanding balance was reduced to $4,713.59. Thereafter, pursuant to an order entered on November 21, 1952, in the Monmouth County Court, the defendant, as executrix, paid to the Collector of Internal Revenue, the sum of $554.28 which sum was applied by the Collector against the unpaid balance for 1945, leaving $4,159.31, plus interest due and unpaid.

6. On March 15, 1947, Bess filed his income tax return for 1946, reporting thereon tax due in the sum of $10,710.40, and claiming a refund of tax in the sum of $3,254.69, which latter sum was refunded to him by the Commissioner of Internal Revenue, with interest of $36.83 on June 19, 1947. Thereafter, on June 17, 1948, Bess signed a Form 870 consenting to the assessment of additional income tax for the year 1946, in the sum of $3,507.03, plus interest, following an audit of his return by a revenue agent. On July 30, 1948, the Commissioner assessed, for the year 1946, the tota lsum of $3,789.32, composed of $3,507.03 additional income tax, plus $282.29 interest thereon. Notice and demand was made on July 30, 1948, and a second notice and demand on August 9, 1948. No part of the sum of $3,789.32 has been paid.

7. A true and correct photostatic copy of the Commissioner's assessment list, covering the years 1945 and 1946 is attached hereto, made a part hereof and marked "Exhibit A".

8. On or about March 15, 1948, Bess filed his income tax return for 1947. Thereafter, on August 24, 1950, the Commissioner assessed for the year 1947, the total sum of $925.94, composed of $813.22 additional income tax, plus $112.72 interest thereon. Notice and demand was made on September 8, 1950. No part of the sum of $925.94 has been paid.

9. The assessment referred to in paragraph 8 was transferred from the Third District of New York to the Fifth District of New Jersey on the January 1951 Assessment List. A true and correct photostatic copy of the Commissioner's assessment list covering the year 1947, is attached hereto, made a part hereof and marked "Exhibit B".

10. On August 1, 1950, the Collector of Internal Revenue filed proofs of claim with the defendant, as executrix of the estate of Herman Bess, for the sums of $4,713.59 and $3,789.32, being unpaid income taxes for 1945 and 1946, respectively. On January 19, 1951, a proof of claim was likewise filed in the sum of $925.94 for unpaid taxes for 1947. Proofs of claim were also filed in the sums of $1,411.19 and $2,579.52, totalling $3,990.71, for unpaid income taxes for 1948 and 1949.

11. On July 19, 1952, the defendant as executrix, submitted a Report of Claims to the Monmouth County Court, Probate Division, and listed thereon as presently due unpaid federal income taxes for the years 1945 through 1949. That report set forth claims against the estate in the total sum of $22,081.06 and, upon the basis of an inventory and appraisement, a personal estate of $6,973.85.

12. Pursuant to due notice given by the defendant, as executrix, on July 17, 1952, the estate of Herman Bess was adjudged insolvent by the Monmouth County District Court, Probate Division.

13. The defendant, as executrix, allowed all the claims filed by the Collector of Internal Revenue and thereafter paid the sum of $3,990.71 on account of unpaid taxes for 1948 and 1949 to the Collector of Internal Revenue out of the assets of the estate.

14. The final account filed by the defendant as executrix listed the following expenditures out of the total personal estate of $6,973.85:

Funeral expenses	$ 682.50
Administrative expenses	210.36
Counsel fees	1,500.00
Federal income taxes for 1948 and 1949	3,990.71
Total	$6,383.57

6 On November 21, 1952, the Monmouth County District Court ordered all the remaining funds in the estate, totalling $554.28, be paid to the Collector of Internal Revenue. This sum was applied by the Collector as set forth in paragraph 5 above.

15. On or about October 1, 1951, defendant as executrix filed with the Collector of Internal Revenue for the First District of New Jersey, an estate tax return and, for the purpose of the estate tax laws, disclosed thereon a total gross estate of $122,476.96 and no estate tax payable.

16. Upon the estate tax return, a deduction for debts of the decedent in the sum of $30,480.40 was claimed and allowed. Included in that sum were the sums of (1) $9,428.85, (2) $1,411.19 and (3) $2,579.52 representing unpaid income tax and interest for the years (1) 1945, 1946 and 1947, (2) 1948 and (3) 1949.

17. At the time of his death, Bess and the defendant had the following property in their joint names:

Checking account, Chase National Bank, New York City	$ 587.15
Real estate (equity)	52,054.48
Cadillac automobile	2,600.00

18. At the time of his death, Bess carried insurance upon his life in the total amount of $85,906, distributed among nine separate policies with five different insurers.

19. Upon one of the nine policies (issued by Prudential Insurance Company of America, Policy No. 8225731) in the face amount of $5,000, his estate was; on June

29, 1950, the named beneficiary and received thereunder proceeds in the sum of $3,834.43, by virtue of an
7 outstanding policy loan plus interest of $1,175.12, which sum was distributed by defendant as executrix and is not in controversy here.

20. Upon the remaining eight policies of insurance, the defendant, as wife of the insured, was, on June 29, 1950, the named beneficiary and received thereunder as proceeds the total sum of $63,576.95.

21. The eight policies of life insurance upon which defendant, as wife of the insured, was the named beneficiary were as follows:

	Insurer	Policy No.	Face Am't.	Date of Issue	Type of Policy	Proceeds
No. 1	John Hancock Mutual Life Ins. Co.	2700416	$32,000	9-26-35	whole life	$25,033.38
No. 2	John Hancock Mutual Life Ins. Co.	2884650	1,000	11- 1-36	45 pay life	1,071.87
No. 3	Metropolitan Life Ins. Co.	8918803A	5,000	2-14-34	whole life	3,834.91
No. 4	Prudential Insurance Co. of America	8790470	10,000	2-5 -35	modified whole life	8,785.32
No. 5	Prudential Insurance Co. of America	8790471	10,000	2-5 -35	modified whole life	8,785.32
No. 6	Prudential Insurance Co. of America	9768742	10,000	4-26-37	20 yr. endowment	5,406.22
No. 7	State Mutual Life Assurance Co.	445,636	10,406	10-12-35	whole life	8,159.93
No. 8	Aetna Life Ins. Co.	GW 31599	2,500	6-19-50	group life	2,500.00

22. On Policy No. 1, Bess had the right to borrow upon the security of the policy against the cash surrender value, or surrender the policy for cash; he had expressly reserved the right to change the beneficiary and had in fact exercised that right twice in 1945; he had the right of assignment. On June 29, 1950, the cash surrender value of the policy was by virtue of outstanding policy loans,
8 $1,169.70. A photostatic copy of the policy is attached hereto, made a part hereof and marked "Exhibit C".

23. On Policy No. 2, Bess had the right to borrow upon the security of the policy against the cash surrender value, or surrender the policy for cash; he had expressly reserved the right to change the beneficiary but did not exercise that right; he had the right of assignment. On June 29, 1950, the cash surrender value of the policy was by virtue of outstanding policy loans, $262.34. A photostatic copy of this policy is attached hereto, made a part hereof and marked "Exhibit D".

24. On Policy No. 3, Bess had the right to borrow upon the security of the policy against the cash surrender value and had exercised that right on several occasions, so that on June 29, 1950, policy loans and interest thereon aggregated $1,581.09; the cash surrender value by nature of the outstanding loans upon the date of death was only $187.45; he had expressly reserved the right to change the beneficiary but had not exercised that right; he had the right of assignment. A photostatic copy of the policy is attached hereto, made a part hereof and marked "Exhibit E".

25. On Policy Nos. 4 and 5, Bess had the right to borrow upon the security of the policy against the cash surrender value and had exercised that right so that on June 29, 1950, identical policy loans and interest thereon against each policy aggregated $1,253.28; under the terms of the policies he had the right to assign all his rights, benefits and advantages and exercised that right on February 5, 1935, the date of issue, in favor of Bess & Schillin, Inc., its successors or assigns and on April 13, 1938, at the request of the assignee, ownership of the policies was transferred to the insured. Bess had expressly reserved the right to change the beneficiary and on March 28, 1938, had exercised that right on each policy in
9 favor of the defendant, if living, otherwise his executors, administrators or assigns. On June 29, 1950, the cash surrender value of each policy was, by virtue of outstanding policy loans, $171.72. Photostatic copies of the policies are attached hereto, made a part hereof and marked "Exhibit F" and "Exhibit G".

26. On Policy No. 6, Bess had the right to borrow upon the security of the policy against the cash surrender value and had exercised that right so that on June

29, 1950, a policy loan and interest thereon aggregated $4,601.78; he had expressly reserved the right to change the beneficiary but had never exercised that right; he had the right of assignment. The cash surrender value on June 29, 1950, was, by virtue of outstanding policy loans, $933.22. A photostatic copy of this policy is attached hereto, made a part hereof and marked "Exhibit H".

27. On Policy No. 7, Herman Bess had the right to borrow upon the security of the policy against the cash surrender value and had exercised that right so that on June 29, 1950, a policy loan and interest thereof aggregated $2,246.07; he had the right to assign his rights under the policy and had, expressly reserved the right to change the beneficiary. On March 23, 1945, he changed the beneficiary from his wife to his estate, and assigned his right under the policy to The Merchants Trust Co., Red Bank, New Jersey. On April 3, 1945, he renominated his wife beneficiary. On May 6, 1946, the assignee discharged the assignment. On June 29, 1950, the cash surrender value, due to the policy loan outstanding was only $466.38. Attached hereto, made a part hereof and marked "Exhibit I" are (1) copies of letters dated October 7, 1953, and November 6, 1953, from the insurer stating that all but the face of the contract had been destroyed but setting forth the rights under the policy and the time and manner of their exercise, and (2) a photostatic copy of the face of the policy.

28. On Policy No. 8, which was group insurance, Herman Bess had only the right to change the beneficiary.

29. By reason of the death of Herman Bess, the defendant individually, as beneficiary of the policies described in paragraph 21 of this stipulation, became entitled to be paid according to their terms and has in fact received a total sum of $69,576.95 from the named insurance companies.

30. All the policies referred to in paragraph 21 of this stipulation were owned by Herman Bess who paid all the premiums until his death out of his own funds. At no time when any premium was so paid was he insolvent.

31. At no time prior to the institution of this action did the Commissioner of Internal Revenue propose a transferee assessment against defendant under the provisions of Section 311 of the Internal Revenue Code of 1939.

32. The total cash surrender value at the date of death of all the policies referred to in paragraph 21 of this stipulation was $3,362.53.

For the plaintiff:

RAYMOND DEL TUFO, JR.
United States Attorney
Newark 1, New Jersey

By: H. EUGENE HEINE, JR.
Special Assistant to the Attorney General
Washington, D. C.

For the Defendant:

DANIEL OPPENHEIM
17 Academy Street
Newark 2, New Jersey

Dated: Jan. 13, 1955

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11 IN UNITED STATES DISTRICT COURT

(Reported in 134 F. Supp. 467.)

Appearances:

RAYMOND DEL TUFO, JR., United States Attorney, by GEORGE H. BARLOW, Assistant U. S. Attorney, Attorney of Plaintiff.

H. BRIAN HOLLAND, Assistant Attorney General, ANDREW D. SHARPE, H. EUGENE HEINE, JR., Special Assistants to the Attorney General, of Counsel.
DANIEL OPPENHEIM, Attorney of Defendant.

Opinion—Filed September 7, 1955

FORMAN, C. J.:

The complaint in this case alleges that the defendant, Molly G. Bess, owes the plaintiff, the United States, for

income taxes due from her deceased husband in the aggregate of $9,428.84.

The facts are stipulated.

Herman Bess, a resident of New Jersey, died on June 29, 1950, leaving the defendant, his widow, a resident of Deal, Monmouth County, New Jersey, surviving him. On July 17, 1952 his estate was adjudged insolvent by the Monmouth County Court, Probate Division. Claims were filed by the Government for the years, in the amounts, and upon which payments were ordered to be made as follows:

12

Year	Amount	Payment Pursuant to Order of Court
1945	$ 4,713.59	$ 554.28
1946	3,789.32	
1947	925.94	
1948	1,411.19	
1949	2,579.52	3,990.71
Total	$13,419.56	4,544.99
Balance due		$8,874.57[1]

Interest on the above amounts was also claimed. It was further stipulated that Mrs. Bess succeeded to approximately $55,000 of property held in the joint names of herself and her husband;[2] that she was the named beneficiary in eight policies of insurance on the life of her husband from which she received a total of $63,576.95; that on seven of the policies the deceased had had the right to borrow against the cash surrender value, to change the beneficiary, and to assign the policies; that he did change the beneficiary on several of the policies; that the eighth policy was in group insurance and that under it he had only the right to change the beneficiary; that

(1) The demand in the complaint fails to reflect the payment of $554.28, applied to the year 1945 as stipulated.

(2) The Government makes no attempt to reach property held jointly by husband and wife. See *Irvine* v. *Helvering*, 99 F. 2d 265 (8th Cir., 1938).

the deceased paid all of the premiums on the policies and that he was solvent at the time he made such payments and that the cash surrender value of the policies at the date of his death was $3,362.53.

No facts were left disputed and the case poses only questions of law. It is the proceeds received by Mrs. Bess which the Government is now trying to reach
13 on the theory that the defendant is a "transferee" under §311 of the 1939 Code (now §6901 of the 1954 Code), 26 U.S.C. §311:

"§311. Transferred assets

"(a) Methods of collection. The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this chapter (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

"(1) Transferees. The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this chapter."

* * * * * * * * * *

"(f) Definition of 'transferee'. As used in this section, the term 'transferee' includes heir, legatee, devisee, and distributee."

It is the theory of the Government that Mrs. Bess is a "transferee" of "property of a taxpayer" by virtue of having been beneficiary of his life insurance and that she is under a "liability, at law or in equity . . . in respect of the tax."

Implicit in this theory of the case is that the life insurance proceeds received by Mrs. Bess were property of the deceased taxpayer transferred to her burdened with

a liability for his tax delinquency. The Govern-
14 ment concedes, however, that several recent cases in the Court of Appeals have been decided to the contrary. *United States* v. *Truax*, 223 F. 2d 229 (5th Cir. 1955); *United States* v. *New*, 217 F. 2d 166 (7th Cir. 1954); *Rowen* v. *Commissioner*, 215 F. 2d 641 (2nd Cir. 1954); *Tyson* v. *Commissioner*, 212 F. 2d 16 (6th Cir. 1954).[3] Each of these cases distinguishes, or differs from *Pearlman* v. *Commissioner*, 153 F. 2d 560 (3rd Cir. 1946), upon which the Government places heavy reliance.

Rowen v. *Commissioner, supra,* is representative of this problem. There mutliple beneficiaries of a decedent's life insurance policies contested the Commissioner's transferee assessment against them. It was held that since life insurance proceeds were not "property" of the insured even though he had reserved the right to change beneficiaries, there was no transfer of property of a taxpayer and therefore as to the proceeds there could be no transferee liability on the part of the beneficiaries. The court held otherwise as to the cash surrender value, deciding that during the lifetime of the taxpayer the cash value represented property which upon his death merged with the proceeds and was thus transferred to the beneficiaries. But even though the beneficiaries were held to be "transferee(s) of property of a taxpayer" in the amount of the cash surrender value, there was no liability "at law or in equity . . . in respect of the tax "because the Government's rights as a creditor were to be governed by local law and under the applicable New York statutes
15 the entire proceeds of life insurance, including that representing cash surrender value, were beyond the power of creditors to reach.

But the Court of Appeals of this circuit treated such tax liability from a different viewpoint in the case of *Pearlman* v. *Commissioner, supra.* The facts in that case were not materially different from those here and in Rowen,

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(3) None of these cases gives any reason to doubt the holding of *Kieferdorf* v. *Commissioner*, 142 F. 2d 723 (9th Cir., 1944), that transferee liability may be successfully pressed against a decedent's heirs where they are in receipt of life insurance proceeds paid first to the estate as beneficiary, and then distributed to them. In fact, *Rowen* v. *Commissioner*, 215 F. 2d 641 (2nd Cir., 1954), approves the *Kieferdorf* result at pp. 645-646.

except in one particular—there the decedent had paid premiums while insolvent whereas the Government and Mrs. Bess have stipulated that Herman Bess paid all premiums while solvent. This difference was thought controlling in *Tyson* v. *Commissioner*, *supra*, which distinguished the *Pearlman* case on this ground. But although the prior insolvency of the decedent was mentioned in *Pearlman* no particular significance is attached to it in the opinion. Pearlman seems rather to be laying down a broad policy of transferee tax liability wherever life insurance proceeds are distributed to beneficiaries named by an insured who dies owing the Government for back income taxes and who had reserved the right in the policies to change the beneficiary.

> "On principle the question seems to us clearly one to be answered without reference to state law limitations. It would not be disputed that, in general, the imposition and collection of federal income tax is a federal function. One of the questions arising from such an undertaking is the determination of when B is to be liable to pay a tax assessed against A. The Congress could, no doubt, have left this question to be variously determined by the laws of the respective states if it had so desired. But in the absence of a clearly expressed intention to do so, we should not infer it, for such variation does not fit into a uniformly applied system of federal taxation.
>
> The administration of its taxing laws is as
> 16 clearly a function of the federal government as the making of contracts, and the issuing of checks and warrants in payment of its obligations, matters in which the Supreme Court has recently held that the state law does not control. Clearfield Trust Co. *v.* United States, 1943, 318 U. S. 363, 63 S. Ct. 573, 87 L. Ed. 838; United States *v.* County of Allegheny, 1944, 322 U. S. 174, 64 S. Ct. 908, 88 L. Ed. 1209; National Metropolitan Bank *v.* United States, 1945, 323 U. S. 454, 65 S. Ct. 354.
>
> "Once the problem is removed from state statutes and decisions there is no question made of the lia-

bility of this taxpayer as transferee. . . ." 153 F. 2d at p. 562.

Thus, it is easily seen that Pearlman leaves no room for the application of the New Jersey statute[4] protecting life insurance beneficiaries from their insured's indebtedness as, it is urged, is the case with this defendant. The decision in the *Pearlman* case is controlling here.[5]

The defendant further objects that the plaintiff has failed to fulfill statutory requirements contained in §311(a) of the Internal Revenue Code so as to impress her with any liability for the income tax owed by her deceased husband. She argues that any alleged claim against
17 her as a transferee must be assessed and collected in the same manner as in the case of a deficiency on a tax. Section 272(a)(1) prescribes, she contends, the administrative procedure to be followed by the plaintiff in order that liability may be established against a transferee of the nature of which plaintiff claims her to be. Since no procedure was followed by the plaintiff to satisfy the statutory requirements she submits that she cannot in this suit be adjudged responsible for the said taxes and that it should be dismissed against her. She further contends that since the plaintiff failed to follow the statutory procedure outlined it can be regarded only as an ordinary creditor of the deceased taxpayer and in order to recover from her the plaintiff must plead and prove that she was the recipient of a fraudulent conveyance of the proceeds of the life insurance policies under N. J. R. S. 17:34-28 which, she alleges, insulates her rights as a beneficiary of an insurance policy from plaintiff's reach.

The statutory procedure to which the defendant refers is not exclusive and the plaintiff may endeavor to enforce

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(4) N. J. R. S. 17:34-28.

(5) The *Pearlman case* has been construed broadly and followed by a number of district courts and the tax court, although some of these cases have been reversed. A representative group follows: *United States* v. *New*, 123 F. Supp. 312 (N. D. Ill., 1954), reversed 217 F. 2d 166 (7th Cir., 1954); *United States* v. *Goddard*, 111 F. Supp. 607 (W. D. N. Y., 1952); *Aura Grimes Bales*, 22 T. C. 355 (1954); *Ruth Halle Rowen*, 18 T. C. 874 (1952), reversed 215 F. 2d 641 (2nd Cir., 1954); *Christine D. Muller*, 10 T. C. 678 (1948). See also Pyle, Liability of Insurance Proceeds for Unpaid Income Taxes of Decedents, 31 Taxes 183, 188-189 (1953).

collection of its taxes by actions at law or in equity. *Phillips* v. *Commissioner*, 283 U. S. 583 (1931); *Leighton* v. *United States*, 289 U. S. 506 (1933).

Judgment for the plaintiff will be entered in the amount of $8,874.57.

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18 IN UNITED STATES DISTRICT COURT

Order for Judgment—Filed May 5, 1956

This cause came on to be heard by the Court sitting without a jury on January 13, 1955, and the Court having considered all the evidence and the oral arguments of counsel and briefs submitted by the parties and being fully advised in the premises, it is hereby Ordered, Adjudged and Decreed that plaintiff have and recover from defendant $8,874.57 together with interest of $697.91 (being interest on $4,159.31 from November 21, 1952 to September 7, 1955) and interest of $1,804.91 (being interest on $3,789.32 from July 30, 1948 to September 7, 1955) and interest of $279.91 (being interest on $925.94 from August 24, 1950 to September 7, 1955), or a total of principal and interest of $11,657.30, and that plaintiff have execution therefor.

Date: May 15, 1956

s/ FORMAN,
Chief Judge,
United States District Court.

Approved as to form Only:

s/ DANIEL OPPENHEIM,
Attorney for Defendant.

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19 No. 12,026

Stipulation and Order Extending Time to File Brief and Appendix—October 10, 1956

(omitted in printing)

23

Stipulation and Order Extending Time to File Reply Brief—October 31, 1956

(Omitted in printing)

* * * * * * * * * *

27 IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 12,026

UNITED STATES OF AMERICA

v.

MOLLY G. BESS, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued December 4, 1956

Before BIGGS, *Chief Judge*, KALODNER, *Circuit Judge*, and KRAFT, *District Judge*.

Opinion of the Court—Filed March 28, 1957

BY BIGGS, *Chief Judge*.

The court below gave judgment in favor of the United States against the defendant, Molly G. Bess, widow of Herman Bess, on the theory that under Section 311 of the 1939 Code, 26 USCA (I.R.C. 1939) § 311, the defendant was a transferee of property of a taxpayer, her husband, who owed the government delinquent income taxes.

The facts are not in dispute. The defendant's husband died on June 29, 1950. At the time of his death there were in force eight insurance policies on his life. Seven of the policies were issued during 1934, 1935, 1936, and 1937. The eighth, a group insurance policy with no cash value, was issued June 19, 1950. Herman Bess had the right to change the beneficiary of the policies and also had the right to borrow upon the security of the cash surrender

value of the seven policies described first herein.
28 The defendant was named as beneficiary when the policies were issued to Herman Bess, and, except for temporary changes with respect to two policies,[1] the defendant remained the beneficiary. The government and the defendant have assumed, without dispute, that Herman Bess was solvent when the policies were issued, and have stipulated that he was solvent when the premiums were paid. The total cash surrender or loan value of all the policies was $3,362.53 at the time of Bess's death. The defendant received $63,576.95 as the total proceeds of the eight policies.

On July 17, 1952, more than two years after his death, the estate of Herman Bess was adjudged insolvent. Part payment has been made on the claims of the United States for income taxes owed by Herman Bess, but a balance of $8,874.57 remains unpaid. The United States instituted suit against the defendant for that amount plus interest from the date of assessment and was awarded judgment in the sum of $11,657.30. 134 F. Supp. 467 (D.N.J. 1955). Mrs. Bess has appealed.

The statute on which the alleged liability of the defendant is bottomed is Section 311 of the 1939 Internal Revenue Code, 26 USCA (I.R.C. 1939) § 311, set out in the margin.[2]

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[1] In one policy the beneficiary was changed from the defendant to the insured's estate on April 4, 1945, and on the same day the defendant was redesignated as the beneficiary; in another policy the beneficiary was changed from the defendant to the insured's estate on March 23, 1945, and on April 3, 1945 the defendant was redesignated as the beneficiary.

[2] Section 311 provides in pertinent part: "Transferred assets (a) Method of collection. The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this chapter (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

"(1) Transferees. The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this chapter.

"(f) Definition of 'transferee'. As used in this section, the term 'transferee' includes heir, legatee, devisee, and distributee."

It is the universal view that the statute created no new substantive rights and liabilities and that the only liabilies to be enforced thereunder are those existing in law or in equity when the enforcement proceeding is begun. Pearlman v. Commissioner, 153 F. 2d 560, 561-2 (3 Cir. 1946), and Rowen v. Commissioner, 215 F. 2d 641, 643 (2 Cir. 1954). Herman Bess was domiciled in New Jersey up to his death. His widow's domicil remains there. In Pearlman v. Commissioner, *supra*, at p 562, we stated that "On principle the question [as to the existence or non-existence of liability on the part of the widow] seems to us clearly to be one to be answered without reference to state law limitations." We also said, since we had before us a husband domiciled in Pennsylvania until his death with his wife's domicil remaining there, that "Whether the reliance is placed on general law as declared by federal courts, or on Pennsylvania law, we think the conclusion of the Tax Court must stand." We may perhaps remark here, without cynicism, that a declaration on principle is not necessarily a declaration of law, but we went on to say that we preferred to rest the decision on the wider ground that since the e was a federal tax question to be decided it should be decided on general law as laid down by the Federal courts and not be subject to the limitation in the law of any State. We adhere to our former ruling but since this case may reach the reviewing Court, other Courts of Appeals having reached the contrary conclusion, Rowen v. Commissioner, *supra*, and the authorities cited therein, 215 F. 2d at 648-9, we have set out what we believe to be the status of Mrs. Bess under the law of New Jersey, were that that law applicable; in *footnote 3 below*. Cf. Poe v. Seaborn, 282 U.S. 101 (1930),

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[3] As to the law of New Jersey the applicable sections are New Jersey R.S. 17:34-28 and 17:34-29; NJSA 17:34-28 and NJSA 17:34-29. Section 29 provides that eve . policy of life insurance made payable to or issued for the benefit of a married woman, or after its issue assigned or in any way made payable to a married woman, whether by her husband or by any other person, shall "inure to her separate use and benefit . . ." according to its terms unless premiums were paid in fraud of creditors as set out in Section 28. There can be no doubt that in the absence of fraud on creditors in the payment of premiums or assignment of the beneficial interest to some person other than to the wife, the wife's interest in the proceeds of a policy has a status described by the law of New Jersey as a "vested interest" and may

and United States v. Scott, 167 F. 2d 301 (8 Cir. 1948).

As to the general law as declared by the Federal courts the decision of the Supreme Court in Central Bank of Washington v. Hume, 128 U.S. 195 (1888), is illustrative of features of it. The decision holds, *inter alia*, that it is the general rule that a policy and the money to become due under it, belong, the moment the policy is issued to the person named in it as the beneficiary. The policies of insurance in the Hume case quite possibly did not provide that the insured could change the beneficiary but this feature, as we have indicated, is irrelevant here. Hume was admittedly insolvent at the time the insurance was effected and it was argued that the policies were within the provisions of 13 Elizabeth, c. 5. The Supreme Court was of the view that the statute of 13 Elizabeth governed and held *inter alia* that Hume's creditors were not entitled to recover the premiums paid by him on life insurance policies issued for the benefit of his wife and children. The statute of 13 Elizabeth was designed to prevent conveyances which defeated or delayed creditors. It declares, in substance, that every conveyance made to the end, purpose, and intent to delay, hinder, or defraud creditors and others of their just and lawful actions shall be void, with the proviso that nothing therein contained shall extend to defeat any estate or interest made on good consideration and bona fide to any person having, at the

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not be reached by a creditor, even by the United States. Cf. Sullivan v. Maroney, 76 N.J.Eq. 104, 109, 73 A. 843, 844 (1909), affirmed 77 N.J.Eq. 565, 78 A. 150 (1910), and Phoenix Mut. Life Ins. Co. v. Connelly, 188 F. 2d 462, 464-5 (3 Cir. 1951).

As we have stated the parties have agreed that Herman Bess was solvent when the policies were issued and that he was solvent at all times when premiums were paid. There therefore was no payment of premiums in fraud of creditors and Mrs. Bess was designated as beneficiary at all times save for two small irrelevant periods in respect to only two of the policies. See note 1, *supra*. As to the cash surrender value of the policies, amounting to $3,362.53, though we have found no case in point and none has been cited to us, we are of the opinion that the term "proceeds" as employed in the New Jersey statute means the full amount payable to the beneficiary upon the policy on the death of the insured. It follows therefore that under the law of New Jersey Mrs. Bess may retain the full proceeds of the policies in the instant case without liability for the claim asserted by the United States against her husband for unpaid taxes.

time, no notice of such fraud, 24 Am. Jur., Fraudulent Conveyances § 4, p. 163. See Annotation, 31 A.L.R. 51. The statute of 13 Elizabeth is generally acknowledged to be the principal source of judicial decision as to when a conveyance is fraudulent. *Id.* at p. 164. The statute is declaratory of the existing principles of the common law. *Ibid.* We believe that the governing principles of the general law are as set out in this paragraph.

Coming now to our decision in the Pearlman case we find that the court below interpreted our ruling as requiring it to decide that the proceeds of the policies in the case at bar were transferred to Mrs. Bess[4] on her husband's death. We think that such a conclusion was not warranted by our Pearlman decision[5] nor is it supported by more recent cases.[6] The proceeds of the policies—putting cash surrender values to one side for the time being—were not the property of Herman Bess as required by Section 311(a)(1). He never possessed the right to receive the proceeds and therefore he could not transfer them. Moreover, as we have stated, Bess was solvent when the policies wre issued and solvent at all times when premiums were paid. In the Pearlman case, while Pearlman was solvent when the policies were issued and when some of the premiums were paid, after he became insolvent and up to the time of his death he continued to pay the premiums on the policies. In Pearlman we went no further than the Tax Court which held that the beneficiaries of the policies were transferees as to the cash surrender value of the policies. In the case at bar Mrs. Bess cannot be found to be a transferee of the *proceeds* of the policies under the general law as we have set it out.

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[4] We conclude this because while the proceeds of the policies amounted to $63,576.95, and the judgment in favor of the United States to $11,657.30, the amount of the judgment far exceeded the cash surrender value of the policies which, as we have stated in this opinion, was $3,362.53.

[5] The facts of the case as found by the Tax Court in 4 T.C. 34 (1944) disclose that the cash surrender values of the pertinent policies totaled $51,541 and that the tax liability was $25,713.57. See Rowen v. Commissioner, 215 F. 2d 641, 645 (2 Cir. 1954) on this point.

[6] See United States v. New, 217 F. 2d 166, 167 (7 Cir. 1954), and Rowen v. Commissioner, 215 F. 2d 641, 644 (2 Cir. 1954).

The cash surrender values of the policies in the instant case present a different issue. Bess was adjudicated
32 insolvent more than two years after his death but the account filed by Mrs. Bess as executrix makes it clear that he also was insolvent at the time of death. At the time of his death, as we have stated, the policies possessed a cash surrender or loan value of $3,362.53. He therefore possessed just prior to his death, a chose in action in the amount stated which he could have collected from the insurance companies in accordance with the terms of the policies. The Supreme Court in the Hume case, *supra*, seemed to recognize the payment of premiums as transfers and the incidence of the payments of premiums therefore timed the transfers here. By the terms of the policies in the Hume case nothing passed at the time of Hume's death. So was it here. It is therefore not realistic here, as the court pointed out in Rowen v. Commissioner, *supra*, 215 F. 2d at p. 647, in a like situation, to view Bess's death as wiping out the loan or surrender values. Bess's death was merely a condition on the occurrence of which the loan or surrender values of the policies no longer were payable to him but became merged in the larger values which the insurance companies were obligated to pay to Mrs. Bess. The loan or surrender values were then an item of property and Mrs. Bess was a transferee of them within the meaning of Section 311(a)(1). It follows that the United States is entitled to recover the amount of the loan or surrender values from her.

Other points raised by the parties do not require discussion.

The judgment of the court below will be vacated with the direction to enter judgment for the United States in conformity with this opinion.

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35 (File endorsement omitted)

IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 12,026

UNITED STATES OF AMERICA

vs.

MOLLY G. BESS, *Appellant*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: BIGGS, *Chief Judge,* KALODNER, *Circuit Judge,* and KRAFT, *District Judge.*

Judgment—March 28, 1957

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby vacated, with direction to enter judgment for the United States of America in conformity with the opinion of this Court.

March 28, 1957

37 (File endorsement omitted)

IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 12,026

Motion and Order Extending Time to File Petition For Rehearing—April 12, 1957

Motion being made by Molly G. Bess, the Defendant-Appellant herein, through her attorney Morris J. Oppenheim, for extension of time within which to file a petition

for rehearing seeking to clarify the issues preliminary to making application to the Supreme Court of the United States for a writ of certiorari.

It is on this 12th day of April, 1957 ordered that the time within which said Defendant-Appellant may file a Petition For Rehearing be and it is hereby extended to and including the 27 day of April 1957.

KALODNER,
Circuit Judge

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41 (File endorsement omitted)

IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Docket No. 12,026

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

MOLLY G. BESS, *Defendant-Appellant*

Petition For Rehearing—Filed April 29, 1957

The defendant-appellant, Molly G. Bess, presents this, her Petition for Rehearing of the above-entitled cause, and, in support thereof, respectfully shows:

1. The appeal herein was argued before this Court on December 4, 1956.

2. On March 28, 1957, this Court rendered its decision vacating the judgment of the District Court and directing entry of judgment in favor of the plaintiff-appellee in accordance with the opinion.

3. The defendant-appellant seeks a rehearing of this cause upon the following grounds:

A.

This case is not "bottomed" on Section 311 of the Internal Revenue Code of 1939 as this Court has assumed in

its opinion and therefore it does not follow that the United States is entitled to recover the loan or surrender value from Mrs. Bess as a transferee within the meaning of Section 311 a (1) as this Court has determined.

This case was tried in the District Court on a stipulation of facts, paragraph 31 of which provides:

> "At no time prior to the institution of this action did the Commissioner of Internal Revenue propose a transferee assessment against defendant under the provisions of Section 311 of the Internal Revenue Code of 1939."

The brief filed on behalf of the plaintiff-appellee, United States of America, states:

> "* * * The Government here is not proceeding under Section 311 of the Internal Revenue Code of 1939 * * *." (Appellee Br. page 27).

B.

This case does not present a "federal tax question" to be "decided on general law as laid down by the Federal Courts" as this Court has assumed in its opinion (Opinion page 3).

No federal tax question is presented.

The assessment for taxes against Herman Bess was tantamount to a judgment. Although as between Herman Bess and the United States the basis for the judgment was a tax, nevertheless as between the defendant-appellant, Molly G. Bess, and the United States, the latter is merely a judgment creditor of Herman Bess, having no greater or different rights than any judgment creditor of Herman Bess regardless of the nature of Bess' debt.

In *Stern* vs. *Commissioner*, also involving transferee liability, decided by the Court of Appeals, 6th Cir., after the case at bar was argued that Court wrote:

> "In this case, *the Government is in no better position than any other creditor*". *Stern* vs. *Commissioner*, 6th Cir., decided 2/26/57, 1957 C. C. H., Par. 9429. (Italics supplied).

43 C.

This case is not governed by the rationale of the *Pearlman* case 153 F. 2d 560 as this Court in its opinion has assumed, since the case at bar is clearly distinguishable in three material respects, namely:

1. In *Pearlman* the Commissioner of Internal Revenue assessed the transferee liability under section 311 Internal Revenue Code of 1939.

In the case at bar on the other hand, no steps were taken to impose liability upon the defendant-appellant under section 311.

2. In *Pearlman* the insured was hopelessly insolvent when he took out the policies, when he changed the beneficiary from his estate to his family and when he paid the premiums. In other words, he definitely diverted to his family money to which his creditors were entitled.

In the case at bar, to the contrary, it is stipulated that Bess was solvent at all times when he paid the premiums, (Stip. 30). In fact, since he had an interest in assets worth $55,241.63 at his death, of substantially greater value than his total liabilities (Stip. 17), the inference of the Court that it is "clear that he also was insolvent at the time of death" is at least debatable.

3. In *Pearlman* this Court determined that the beneficiary was liable "whether reliance is placed on general law as declared by federal courts, *or on Pennsylvania law* * * *" (italics supplied).

To the contrary, this Court has pointed out in its opinion that if the law of New Jersey is applied then the defendant-appellant is not liable in any amount.

44 D.

The Court has determined that this case "should be decided on general law as laid down by the Federal Courts and not * * * subject to the limitation in the law of any state."

In footnote 3 to the opinion the Court has correctly set out the applicable New Jersey law. The footnote concludes:

"It follows therefore that under the law of New Jersey Mrs. Bess may retain the full proceeds of the policies in the instant case without liability for the claim asserted by the United States against her husband for unpaid taxes."

In its opinion entered after the case at bar was argued, the Court of Appeals for the 6th Circuit, reversing the Tax Court, held that the liability, if any, of a life insurance beneficiary for unpaid income taxes of the insured was to be determined by state law. *Stern* v. *Commissioner*, C. A.-6, decided 2/26/57, 1957 C. C. H., Par. 9429.

The Federal statute, 28 U. S. C. A., Par. 1652, (formerly 28 U. S. C. A., Par. 725), June 25, 1948, c. 646, 62 Stat. 944 provides:

"The laws of the several states, except where the Constitution or treaties of the United States or Acts on Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

The United States Supreme Court in construing that statute ruled:

"Third. Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general', be they commercial law or a part of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."

Since the case at bar is not "bottomed" on Section 311 of the Internal Revenue Code of 1939; since it is not a "tax" case; and particularly since Congress has not legislated the substantive law respecting transferee liability (Section 311 is procedural only), and neither "the Consti-

tution or treaties of the United States or Acts of Congress otherwise require or provide" the law of the State of New Jersey governs the law to be applied in this case.

Conclusion

For the reasons set forth above it is respectfully urged that rehearing be granted.

Respectfully submitted,

Morris J. Oppenheim,
Counsel for Defendant-Appellant.

Certificate of Counsel

I Hereby Certify that the foregoing Petition for Rehearing is presented in good faith and not for delay in accordance with Rule 33 of the Rules of this Court.

Morris J. Oppenheim,
Counsel for Defendant-Appellant.

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47 (File endorsement omitted)

IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 12,026

(Title omitted)

Order Denying Petition for Rehearing—May 20, 1957

Present: Biggs, *Chief Judge,* and Kalodner, *Circuit Judge,* and Kraft, *District Judge.*

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By the Court
Biggs,
Chief Judge.

Dated: May 20, 1957

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49 (File endorsement omitted)

IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 12,026

(Title omitted)

Order Staying Issuance of Mandate—May 29, 1957

Pursuant to Rule 36 (2) of this Court, it is ORDERED that issuance of the mandate in the above cause be, and it is hereby stayed until June 24, 1957.

BIGGS,
Chief Judge.

May 29, 1957

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51 (File endorsement omitted)

IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 12,026

(Title omitted)

Motion and Order Further Staying Issuance of Mandate—June 28, 1957

Motion being made by Molly G. Bess, the Defendant-Appellant herein, through her attorney, Morris J. Oppenheim, for a further stay of mandate on the ground that it is desired to make application to the Supreme Court of the United States for a writ of certiorari, or to take such other steps as may be provided by the rules and by law for review or further consideration,

It is on this 28th day of June, 1957 ordered that the issuance of the mandate in this case be and it hereby is stayed for a period of 30 days from the date hereof.

BIGGS,
Chief Judge.

Consent is given to the entry of this order.

/s/ Morris J. Oppenheim
MORRIS J. OPPENHEIM
/s/ Charles K. Rice,
CHARLES K. RICE
Assistant Attorney General.

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55 Clerk's Certificate to foregoing transcript omitted in printing.

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57 SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. ——

UNITED STATES OF AMERICA, *Petitioner*

vs.

MOLLY G. BESS, *Transferee*

Order Extending Time to File Petition for Writ of Certiorari—June 21, 1957

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 23, 1957.

WILLIAM J. BRENNAN, JR.,
Associate Justice of the Supreme Court of the United States.

Dated this 21st day of June, 1957.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. ——

MOLLY G. BESS, *Petitioner,*

vs.

UNITED STATES OF AMERICA

Order Extending Time to File Petition for Writ of Certiorari—August 9, 1957

UPON CONSIDERATION of the application of counsel for titioner,

IT IS ORDERED that the time for filing petition for writ of rtiorari in the above-entitled cause be, and the same is reby, extended to and including September 19, 1957.

WILLIAM J. BRENNAN, JR.
Associate Justice of the Supreme Court of the United States.

Dated this 9th day of August, 1957.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

Nos. 395 and 410

UNITED STATES OF AMERICA, *Petitioner,*

vs.

MOLLY G. BESS; and
MOLLY G. BESS, *Petitioner,*

vs.

UNITED STATES OF AMERICA

Order Allowing Certiorari—October 28, 1957

The petitions herein for writs of certiorari to the United ates Court of Appeals for the Third Circuit are granted.

The cases are consolidated and transferred to the summary calendar with a total of one hour allowed for oral argument. The cases are assigned for argument immediately following No. 311.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petitions shall be treated as though filed in response to such writ.